Public Prosecutor v Selvaraju Mudaliar a/l Kalliparamal

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–9 OF 2001
KN SEGARA J
15 DECEMBER 2005

Criminal Law — Murder — Defences — Grave and sudden provocation — Allegation that deceased teased accused 20 hours earlier — Whether evidence of accumulated provocation by deceased on accused was an afterthought — Whether grave and sudden provocation proved

Criminal Law — Defences — Unsound mind — Allegation that deceased teased accused — Whether accused knew that his acts were either morally wrong or contrary to law

The accused, an inmate of a drug rehabilitation centre in Dengkil, Sepang, Selangor, was charged for the murder of a fellow inmate ('the deceased'). SP6, also an inmate at the drug rehabilitation centre testified that he saw the accused swing the cangkul at the deceased's head and the cangkul struck the deceased's head. The deceased was lying on his bed when the accused took him by surprise and, using the cangkul injured the deceased's leg first. He then struck the fatal blow on the deceased. By his own testimony on oath, the accused admitted he intended to inflict injury on the deceased, although he denied he had any intention to kill the deceased. The accused testified that the deceased always teases, disturbs and hits him. The issue was whether upon a consideration of the totality of the evidence of the prosecution and the defence, had the accused established the defence of unsound mind (s 84 Penal Code) or brought his case within any of the exceptions under s 300 Penal Code.

Held, convicting the accused and sentencing him to death:

(1) There was no evidence, on the basis of which it could be said that at the moment of the act of striking the deceased with the cangkul, the accused was incapable of knowing that what he was doing was wrong or contrary to law. To establish that the acts done by the accused are not offences under s 84 Penal Code, it must be proved (on a balance of probability — see s 105 Evidence Act 1950) that at the time of commission of the act, the accused, by reason of unsoundness of mind, was incapable of either knowing that the acts were either morally wrong or contrary to law. The question whether the appellant was suffering from such incapacity at the time of the commission of the act/s can

be determined, not only by medical evidence and expert opinion, but also, by his conduct and the state of his mind before and after the crucial time (see para 26).

(2) The accused wanted retribution. He testified he wanted to injure the deceased. He was fully conscious what he did was wrong because he attempted to run away after striking the fatal blow, but was prevented by two inmates. He was fully conscious that he had injured the deceased with the cangkul because he told SP6 to send the deceased to the hospital, while he was attempting to flee from the scene (see para 27). In the above circumstances, the accused had failed to establish the defence under s 84 Penal Code (see para 28).

(3) Even if it is true that the deceased had disturbed the accused on the afternoon of 11 March 2001, such disturbance could not amount to a grave and sudden provocation to deprive the accused of self control to launch the assault on the deceased, almost 20 hours later, with a deadly weapon. However, the evidence of SP6 seemed to suggest that the accused and deceased were friends and that he had never seen the deceased disturb or bully the accused (see para 32).

(4) The evidence of SP6 was never challenged by the defence, leading to the irresistible conclusion the testimony by the accused, that he had been teased, disturbed and pressured by the deceased over the two months he knew him as a fellow inmate, was a fabrication and an after-thought, introduced by the accused to create a defence. In the circumstances, any attempt by the accused to establish the scenario of an accumulated provocation over the two months, with a resultant loss of self control by the accused on the date of the incident, must also be rejected as an afterthought by the accused. In any event, even if the matters alluded to by the accused in his testimony did occur, the events were not sufficiently grave, by the standards of any reasonable man, to warrant the retaliation and infliction of such a fatal injury to the deceased by way of retribution (see para 33).

[Bahasa Malaysia summary

Tertuduh, seorang banduan di pusat pemulihan dadah di Dengkil, Sepang, Selangor, telah dituduh kerana membunuh seorang banduan lain ('si mati'). SP6, juga seorang banduan di pusat pemulihan dadah telah memberi keterangan bahawa beliau telah melihat tertuduh mengayun cangkul ke kepala si mati dan cangkul tersebut telah memukul kepala si mati. Si mati sedang berbaring atas katilnya apabila memeranjatkannya dan, dengan menggunakan cangkul itu telah mencederakan kaki si mati dahulu. Beliau kemudiannya memberi pukulan maut kepada si mati. Melalui keterangan bersumpah beliau, tertuduh mengakui beliau berniat untuk mencederakan si mati, meskipun beliau menafikan beliau mempunyai apa-apa niat untuk membunuh si mati. Tertuduh memberi keterangan bahawa si mati sering mengejek, mengganggu dan memukulnya. Persoalannya adalah sama ada setelah satu pertimbangan terhadap keseluruhan keterangan pihak pendakwa dan pihak pembela, tertuduh telah membuktikan pembelaan berfikiran tidak waras (s 84 Kanun

Keseksaan) atau membuktikan kesnya terangkum dalam pengecualian di bawah s 300 Kanun Keseksaan.

Diputuskan, mensabit kan tertuduh dan menjatuhkan hukuman mati ke atasnya:

(1) Tiada keterangan, atas asas untuk mengatakan bahawa semasa tindakan memukul si mati dengan cangkul, tertuduh tidak berupaya untuk mengetahui bahawa apa yang beliau lakukan adalah salah atau bertentangan dengan undang-undang. Untuk membuktikan bahawa tindakan yang dilakukan oleh tertuduh bukan kesalahan di bawah s 84 Kanun Keseksaan, ia hendaklah dibuktikan (atas imbangan kebarangkalian) — lihat s 105 Akta Keterangan 1950) bahawa pada masa perlakuan tindakan tersebut, tertuduh, oleh sebab tidak berfikiran waras, tidak berupaya untuk mengetahui bahawa tindakan tersebut adalah tidak bermoral atau bertentangan dengan undang-undang. Persoalan sama ada perayu mengalami ketidakupayaan sedemikian pada masa melakukan tindakan itu boleh ditentukan, bukan sahaja melalui keterangan perubatan dan pendapat pakar, tetapi juga melalui perbuatannya dan keadaan fikirannya sebelum dan selepas masa tersebut (lihat perenggan 26).

(2) Tertuduh inginkan hukuman. Beliau memberi keterangan beliau ingin mencederakan si mati. Beliau sedar apa yang beliau lakukan adalah salah kerana beliau cuba untuk melarikan diri selepas melakukan pukulan maut itu, tetapi telah dihalang oleh dua orang banduan. Beliau sedar bahawa beliau telah mencederakan si mati dengan cangkul itu kerana beliau memberitahu SP6 untuk membawa si mati ke hospital, semasa beliau cuba melarikan diri daripada tempat kejadian (lihat perenggan 27). Dalam keadaan di atas, tertuduh telah gagal untuk membuktikan pembelaan di bawah s 84 Kanun Keseksaan (lihat perenggan 28).

(3) Jika pun ia benar bahawa si mati telah mengganggu tertuduh pada tengah hari 11 Mac 2001, gangguan tersebut tidak membentuk suatu provokasi yang serius dan tiba-tiba untuk menafikan tertuduh kawalan diri untuk melakukan serangan ke atas si mati, hampir 20 jam kemudian, dengan senjata berbahaya. Bagaimanapun, keterangan SP6 seperti menunjukkan bahawa tertuduh dan si mati bersahabat dan bahawa beliau tidak pernah melihat si mati mengganggu atau membuli tertuduh (lihat perenggan 32).

(4) Keterangan SP6 tidak dipatahkan oleh pihak pembela, yang membawa kepada kesimpulan menarik keterangan tertuduh, yang beliau telah diejek, diganggu dan diberi tekanan oleh si mati selama dua bulan lebih beliau mengetahuinya sebagai banduan, adalah satu rekaan dan yang difikirkan kemudian, yang dikemukakan oleh tertuduh untuk membentuk pembelaan. Dalam keadaan sedemikian, apa-apa percubaan oleh tertuduh untuk membuktikan senario satu provokasi yang terkumpul selama lebih dua bulan, yang mengakibatkan hilang kawalan diri oleh tertuduh pada tarikh kejadian, hendaklah juga ditolak sebagai suatu yang difikirkan kemudian oleh tertuduh. Dalam apa keadaan, jikapun perkara-perkara yang secara tak langsung disebut oleh tertuduh dalam testimoni beliau sememangnya telah berlaku, kejadian tersebut tidaklah serius,

mengikut standard seorang yang waras, untuk mewarankan tindak balas dan mengakibatkan kecederaan parah ke atas si mati melalui hukuman (lihat perenggan 33).]

Notes

For cases on murder generally, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1078–1085.

Cases referred to

Public Prosecutor v Lim Eng Kiat [1995] 1 MLJ 635 (refd)

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 ss 32(1)(i), 105
Penal Code ss 84, 300

Wan Shaharuddin bin Wan Ladin DPP (Attorney Generals Chambers) for the prosecution.
SS Ruben (SS Ruben & Associates) for the accused.

KN Segara J:

[1] The accused, an inmate of a drug rehabilitation centre in Dengkil, Sepang, Selangor, was charged for the murder of a fellow inmate, as follows (exh P2):

> Bahawa kamu, pada 12 Mac 2001, jam lebih kurang 10.40 pagi di asrama Bakawali 3, Pusat Serenti Dengkil, Dengkil, di dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan telah melakukan bunuh dengan menyebabkan kematian terhadap Sivalingam a/l Subramaniam (K/P: A1117291), dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan

[2] On 12 March 2001, the accused had been an inmate at Pusat Serenti Dengkil for a period of six months. He resided in the hostel known as 'Asrama Bakawali 3' at the drug rehabilitation centre. The deceased also stayed at the same hostel.

[3] Mohd Khamsi bin Hasimi (SP6), was also an inmate at the said drug rehabilitation centre on 12 March 2001. He also lived at the same hostel as the accused and the deceased. SP.6 testified that he knew both the accused and the deceased. He testified that at about 9.30am, on 12 March 2001, while he was watching TV, he heard a knock on a bed. He turned his head to the back and he saw Sivalingam (the deceased) holding on to his leg and standing, whilst Selvaraju (the accused) was holding a cangkul. The deceased's leg was bleeding. He also testified that he knew that the deceased was sleeping on his bed before he saw him holding onto his leg. The deceased's bed was about 40ft from where SP6 was watching TV. The TV was in the same room as the bed. He further testified that he saw the accused swing the cangkul at the deceased's head and the cangkul struck the deceased's head. After that, the accused left the hostel, with the cangkul still in his hand. SP6 followed behind the accused and asked, 'What is the reason? ('Apa pasal?')

but the accused told SP6 not to question him but to send the deceased to the hospital ('Tak payah tanya. Hantar dia ke hospital'). The accused then attempted to run away, after placing the cangkul beside a drain, about 40ft away from the hostel. However, two other inmates, by the name of Mutalib and Daud, managed to prevent the accused from running away. SP6 identified the cangkul (exhibit P9) as being similar to the cangkul held by the accused, on the day of the incident.

(According to the learned DPP Mutalib and Daud were HIV victims. Both have passed away and therefore unable to testify at the trial).

[4] SP6 testified that before the accused struck the cangkul at the deceased's head he did not see both of them quarreling. Although the deceased was a more senior inmate than the accused, SP6 had never seen the deceased bully the accused or disturb the accused.

[5] Muhammad Azery bin Daud, SP3, is an auxiliary police attached to the Pusat Serenti Dengkil. He testified there are four Asrama Bakawali at the rehabilitation centre. On 12 March 2001, at about 10.40am, he found many inmates gathered at Asrama Bakawali 3. Upon reaching Asrama Bakawali 3 from his post, he found an Indian inmate lying on his bed, covered with blood on his left leg and the right side of his head. The injured inmate was still alive and was sent to the Klinik Dengkil in the Pusat Serenti's van. At about 12 noon, he lodged a report at Balai Polis Dengkil (exh P5). He returned to Pusat Serenti thereafter, and handed to the police a blood stained cangkul.

[6] On 12 March 2001, at about 7pm, Inspector Mustafa informed ASP Muniandy (SP9) that the injured inmate, Sivalingam, who had been admitted to Hospital Tengku Ampuan Rahimah Klang, had passed away due to the head injury.

[7] Dr Nurliza bt Abdullah (SP7), the forensic pathologist, performed a post-mortem on the deceased, Sivalingam a/l Subramaniam, on 13 March 2001 and prepared a report (P24). Post-mortem examination revealed a deep incised wound to the head which had sliced the underlying skull bone and caused internal injuries to the brain, resulting in his demise. There were no underlying disease processes which contributed to the death. In her opinion, the cause of death is due to the severe head injuries sustained by the deceased from heavy blow to the head. She testified, inter alia:

> Hasil pemeriksaan dalaman pada bahagian kepala didapati tempurung kepala iaitu 'skull vault' menunjukkan kesan belah pada sebelah kanan tulang tempurung yang berlanjutan hingga sebelah kanan dasar tengkorak yang berukuran 15cm panjang.
>
> Selaput otak iaitu duramater pada sebelah kanan menunjukkan kesan koyak yang berpadanan dengan kesan belah pada tulang tempurung kepala. Manakala otak menunjukkan kesan pendarahan pada permukaan luaran otak.
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> Selain itu terdapat juga kesan berdasarkan pada sebelah kanan otak iaitu parietal lobe berserta dengan kesan-kesan lebam yang mengelilingi kesan belah atau kesan potong pada bahagian kanan otak iaitu parietal lobe. Bahagian belakang otak iaitu cerebellum menunjukkan kesan pendarahan pada permukaan luaran.

Pada lazimnya kecederaan sedemikian pada otak boleh membawa kepada kematian disebab berlakunya kecederaan pada otak akan merosakkan saraf-saraf serta salur-salur darah yang menampung kesinambungan jasad seseorang itu.

Kecederaan pada bahagian tulang tempurung kepala serta otak yang menunjukkan kesan belah adalah *bersesuaian disebabkan oleh objek yang berat lagi tajam.*

[P9 dirujuk kepada saksi]

Cangkul ini bersesuaian dengan bahagian sisi tajam cangkul untuk mengakibatkan kecederaan di bahagian kepala.

Kecederaan pada bahagian tulang tempurung kepala serta otak yang demikian tidak mungkin dilakukan oleh simati sendiri.

(Emphasis added.)

[8] SP4, Hitaya Jeevan, the chemist, confirmed that the DNA profile on the blood stains from the cangkul was consistent with the DNA profile of the blood specimen of the deceased.

[9] Dr Rabaiah bte Mohd Salleh, SP5, the Consultant Forensic Psychiatrist, Hospital Bahagia Ulu Kinta, Perak did testify that the accused is a schizophrenic but his condition was stable and at the time of the incident he knew what he was doing and aware of the consequences of his act. She testified, inter alia:

Pada 25 April 2003, seorang pesakit bernama Selvaraju Mudaliar a/l Kalliparamal ada dimasuk ke Hospital Bahagia, Ulu Kinta, Tanjung Rambutan. Beliau telah dimasukkan ke Hospital Bahagia setelah dirujuk Timbalan Pendakwaraya Selangor untuk ditahan untuk pemerhatian.

Saya telah temubual En Selvaraju. Saya masih boleh cam beliau. Dia ada di Mahkamah (OKT dicamkan).

Saya telah menjalankan pemeriksaan atas beliau.

Saya tahu pertuduhan ke atas beliau. Saya dimaklumkan bahawa tuduhan terhadap beliau ialah membunuh seorang lelaki India di Pusat Serenti Dengkil pada tarikh 12 Mac 2001.

Saya ada memeriksa OKT mengikut universal practice iaitu menemubualnya kerap kali, menemubual keluarganya iaitu kedua ibu-bapanya, meletakkan beliau dalam pemerhatian yang rapi dan juga menyemak rekod perubatannya daripada hospital-hospital yang pernah merawatnya. Saya juga telah menjalankan beberapa ujian air kencing dan darah. Keputusannya setelah memeriksa OKT, saya telah simpulkan di dalam laporan perubatan saya bertarikh 2 Julai 2003.

Setelah lebih kurang 2½ bulan beliau bersama kami di Hospital Bahagia, kesimpulan saya ialah:

(1) OKT ada mempunyai gejala-gejala penyakit mental yang dinamakan skizofrenia. Beliau juga sedang menerima rawatan untuk kemurungan.

(2) Walau bagaimanapun, saya juga berpendapat bahawa di masa kejadian pada 12 Mac 2001, penyakit mental beliau di dalam keadaan stabil dan beliau sedar akan akibat daripada perbuatannya.

Saya juga berpendapat bahawa semasa saya menulis laporan perubatan itu beliau layak dihadapkan ke Mahkamah untuk perbicaraan/membela diri.

Daripada kertas pertuduhan dan ringkasan keterangan kes dan percakapan dalam pertuduhan yang saya telah peroleh dan juga dari temubual saya dengan OKT sendiri berulang kali tentang kelakuannya, fikirannya dan perasaannya, beberapa minit sebelum kejadian, semasa kejadian dan selepas kejadian dan juga kes ini telah dibincangkan bersama dengan pakar-pakar psiaktri yang lain bagi second opinion, saya telah membuat kesimpulan bahawa dimasa kejadian beliau tahu akan perbuatannya dan sedar akibat dari perbuatannya.'

(Emphasis added.)

[10] At the close of the prosecution's case, I was satisfied that the prosecution had made out a prima facie case against the accused on the charge, and, accordingly called upon him to enter his defence. The accused elected to give evidence on oath.

[11] The accused did not call any witnesses to testify in support of his sole sworn testimony.

[12] The accused testified that he was at the Pusat Serenti, Dengkil, because he was a drug addict, and as at 12 March 2001, he had been an inmate there for six months. He testified that, on 12 March 2001, he took a cangkul and hit Sivalingam and after that he left Asrama Bakawali 3, and stood outside. He cannot remember what he did when he was standing outside Asrama Bakawali 3.

[13] The accused testified he had known Sivalingam for 2 months prior to the incident, and that Sivalingam always teases, disturbs and hits him, as well as other inmates. The accused also testified that he always keeps to himself, and, before the incident, he had never quarreled with Sivalingam.

[14] Under cross-examination, the accused testified that he obtained the cangkul from the back of the hostel. He agreed he hit Sivalingam with the cangkul because he was very angry with Sivalingam as he always disturbs and teases him. He claimed he did not know whether it was right or wrong in law to hit Sivalingam with the cangkul. As far he was concerned, what he did was justified because Sivalingam always pressured him. He had no intention to kill him, but, only wanted to hurt him. He testified under cross-examination, inter alia:

Saya tidak tahu sama ada memukul Sivalingam dengan cangkul adalah satu perbuatan salah di segi undang-undang.

Apa yang saya buat adalah betul dari segi saya sebab dia selalu pressure saya.

Saya tidak ada niat untuk membunuh dia. Saya hanya mahu cederakan beliau.

Saya setuju saya memukul Sivalingam dengan cangkul sebab saya selalu diusik oleh Sivalingam.

[15] And under re-examination he testified:

Betul sehari sebelum kejadian Sivalingam ada mengacau saya. Ada sebab-sebab lain yang menyebabkan saya marah terhadap Sivalingam. Sebab-sebab lain adalah:

(1) Habuk rokok dimasukkan ke dalam makanan saya.

(2) Semasa saya tidur, beliau sembur air pada muka saya.

(3) Tendang, pijak dan tumbuk di bahagian muka saya.

(4) Memarahi saya dengan menggunakan perkataan lucah.

Perkara-perkara ini telah dilakukan oleh Sivalingam terhadap saya selama 2 bulan saya kenal beliau.

Saya tidak ingat apa fikiran saya sewaktu kejadian.

[16] There is no dispute that the inmate, Sivalingam a/l Subramaniam, died on 12 March 2001, as a result of severe head injuries due to a heavy blow to the head. There is no dispute that the severe head injuries were inflicted by the accused with a cangkul (exh P9). There is no dispute that the accused intended to cause bodily injury to the deceased.

[17] The deceased was lying on his bed. The accused took the deceased by surprise and, using a deadly weapon, that is, a cangkul, injured the deceased's leg first. He then struck the fatal blow on the helpless deceased. By his own testimony on oath, the accused admitted he intended to inflict injury on the accused, although he denied he had any intention to kill the deceased.

[18] There is no dispute, from the evidence of SP7, the bodily injury inflicted, especially on the head of the deceased, is sufficient in the ordinary course of nature to cause death. Under s 300(c) Penal Code, culpable homicide is murder, if the act is done with the intention of causing bodily injury to any person, and the bodily injury intended is sufficient in the ordinary course of nature to cause death, unless the case falls within any of the five exceptions listed in s 300 Penal Code.

[19] Of course, nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law — s 84 Penal Code provides a complete defence if the accused can establish, on reliable evidence, and on a balance of probability, that he was of unsound mind at the time he struck the fatal blow on the head of the deceased with the cangkul.

[20] Now, upon a consideration of the totality of the evidence of the prosecution and the defence, has the accused establish the defence of 'unsound mind' (s 84 Penal Code) or brought his case within any of the exceptions under s 300 Penal Code?

[21] Let me first consider whether the defence of unsound mind has been established on a balance of probability. The only medical evidence as to the mental condition of the accused at the time he committed the act, which led to the death of the deceased, is that adduced from the prosecution's witness Dr Rabaiah bte Mohd Salleh, SP5, the consultant forensic psychiatrist from Hospital Bahagia Ulu Kinta, whose credentials, as an expert in the field of mental sickness and unsoundness of mind, were not challenged. No rebuttal evidence by any medical expert was tendered by the defence for the court to evaluate and make its finding thereon, should there

have been any variance of opinion on the issue of unsoundness of mind expressed by such witness. In evaluating SP5's evidence as a whole, I have not disregarded or over-looked her testimony in cross-examination:

> If a person who is suffering from schizophrenia is not taking medication it is possible that he may not be aware of the consequence of his action.
>
> Rawatan untuk pesakit skizofrenia ialah ubat-ubatan dan psycho-therapy dan jika perlu mungkin ECT (electro compulsive therapy).
>
> Ini semua untuk stabilkan penyakit. Jikalau rawatan tersebut tidak diberi, gejala-gejala penyakit itu tidak akan dikawal. Di mana beliau telah stabil tetapi telah memberhentikan pengambilan ubatnya, ada kemungkinan penyakitnya akan kembali awal atau lambat — tidak boleh dipastikan.
>
> Untuk kemurungan rawatan serupa iaitu ubat-ubatan, psychotherapy dan ECT. Hanya jenis ubatnya berlainan.
>
> OKT mungkin menjalani secondary depression oleh kerana menyalahi penggunaan dadah.
>
> Sebelum OKT dirujuk ke Hospital Bahagia, beliau telah menerima rawatan daripada beberapa pakar psiaktri iaitu sebelum kejadian pada 12/3/2001 dan selepas tarikh tersebut. Saya mendapat tahu daripada Hospital Banting, Selangor beliau juga telah diberi dignosa skizofrenia dan kemurungan sekunder. Beliau menerima rawatan daripada Hospital Banting untuk kali pertamanya pada 6 September 2000. Saya dapat……
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> Tarikh akhir OKT menerima rawatan daripada Hospital Banting ialah 21 Februari 2001. Laporan Hospital Banting ada menunjukkan bahawa OKT pernah menerima ubat-ubatan bagi kedua-dua penyakitnya iaitu skizofrenia dan kemurungan sekunder.
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> I did look through the accused's caution statement given to me by the police before I made my finding.
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> I saw the accused two years after the commission of the offence.
>
> *I do agree I cannot with any certainty say whether the accused was suffering from a relapse of his illness on 12 March 2001 at 10.40am.*
>
> (Emphasis added.)

[22] However, SP5's evidence under re-examination, dispelled any lingering doubts in my mind that the accused could have had a relapse of his mental illness on 12 March 2001, at the crucial moment he struck the deceased's head with the cangkul. She testified in re-examination as follows:

> Setakat apa yang OKT memberitahu saya bahawa *semasa kejadian itu beliau tidak mengalami apa-apa gejala psychotic dan beliau boleh memberitahu saya apa yang beliau telah buat dan sebab-sebabnya saya berpendapat bahawa pada hari kejadian beliau ada dalam keadaan setabil dan beliau tahu akibat daripada perbuatannya.*
>
> Caution statement tersebut adalah satu instrument atau cara daripada banyak-banyak cara untuk membantu saya memahami fikiran dan perasaan dalam perbuatan OKT ini.
>
> (Emphasis added.)

[23] There is no evidence before the court that the accused has had a relapse of his mental illness at any time before the incident, let alone, on the date of the incident. The evidence suggests that whatever mental illness the accused has been suffering from has been treated, and the accused's condition was stable and normal, even though the accused may have failed to take his medicine on some occasions, or failed to take the required dosage as prescribed.

[24] Arishah bin Zakariah, a medical assistant at Klinik Pusat Serenti Dengkil, from whom a statement was recorded under s 112 of the Criminal Procedure Code, on 20 March 2001, was not called by the prosecution to testify, as the prosecution had difficulty tracing him, but, nevertheless, he was made available to the defence at the close of prosecution's case. The police were still not able to trace him when the defence required him as their witness. In the circumstances, learned defence council wished to tender the statement, a copy of which had been given to him when the witness was offered to the defence at the close of the prosecution's case. Since the learned DPP had no objections, SP9, the officer who had recorded the statement, was re-called, and the said statement was produced and marked, exh D25, and the transcript, D25T. The said statement is admissible under s 32(1)(i) of the Evidence Act 1950.

[25] It is clear, upon consideration of the statement of Arishah bin Zakariah, as a whole, the accused was normal at all material times because he was adequately observed, treated and medicated for his mental illness. On this issue, some extracts from the statement may be illuminating:

> Soalan: Adakah Selvaraju mendapat rawatan di Klinik dan apakah jenis rawatan yang dia terima dan berapa kerap?
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> Jawapan: Selvaraju dirawat di Hospital Banting kerana masalah mental. Bagi pihak Klinik di Pusat Serenti Dengkil, kami hanya memantau keadaannya dan pastikan dia diberikan ubat seperti yang di prescribe oleh Hospital Banting.
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> …
>
> Soalan: Siapakah akan berikan ubat-ubat itu pada Selvaraju?
>
> Jawapan: Saya sendiri. Selvaraju ditetapkan masa untuk datang ke Klinik dan mendapatkan ubatnya. Kita tidak dapat paksa dia untuk makan ubatnya jadi adalah kehendaknya untuk datang ke Klinik untuk makan ubatnya. Adakalanya dia tidak datang untuk mengambil ubatnya dan adakalanya dia tidak ikut dosage yang diberikan padanya…
>
> Soalan: Adakah kamu pernah merawatnya kerana berlaku ganas?
>
> Jawapan: Tidak. *Dia selalunya didapati dalam keadaan normal.*
>
> (Emphasis added.)

[26] There is no evidence, on the basis of which it could be said that at the moment of the act of striking the deceased with the cangkul, the accused was incapable of knowing that what he was doing was wrong or contrary to law. To establish that the acts done by the accused are not offences under s 84 Penal Code, it must be proved (on a balance of probability — see s 105 of the Evidence Act 1950)

that at the time of commission of the act, the accused, by reason of unsoundness of mind, was incapable of either knowing that the acts were either morally wrong or contrary to law. The question whether the appellant was suffering from such incapacity at the time of the commission of the act/s can be determined, not only by medical evidence and expert opinion, but also, by his conduct and the state of his mind before and after the crucial time. In this case, the accused's testimony was that he was angry with the deceased because the deceased has been disturbing him, and the last occasion he disturbed him was on 11 March 2001.

[27] He wanted retribution. He testified he wanted to injure the deceased. He was fully conscious what he did was wrong because he attempted to run away after striking the fatal blow, but was prevented by two inmates. He was fully conscious that he had injured the deceased with the cangkul because he told SP6 to send the deceased to the hospital, while he was attempting to flee from the scene. The accused uttered to SP6:

> Tak payah tanya. Hantar dia ke hospital

[28] Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. In the above circumstances, the accused has failed to establish the defence under s 84 Penal Code. Now, it is only left for me to consider whether the defendant has successfully raised any of the exceptions to s 300 Penal Code.

[29] However, based on the testimony of the accused, the court will only consider exception 1 of s 300, which reads:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following provisos:
>
> (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
>
> (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
>
> (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.
>
> Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[30] The defence of provocation would succeed if the provocation were so grave and sudden that the defendant was deprived of his power of self-control and the means he used to retaliate were reasonable in view of the provocation offered. The provocation must be sufficient to deprive a reasonable man of his self-control.

[31] According to the accused, the last occasion that the deceased disturbed him was on the afternoon of 11 March 2001, whereas the incident happened in the late morning, at about 10.40am, on 12 March 2001. He testified under cross-examination:

> Betul saya hanya ingat sehari sebelum kejadian semasa saya makan tengahari, Sivalingam ada kacau saya.

[32] Even if it is true that the deceased had disturbed the accused on the afternoon of 11 March 2001, such disturbance cannot amount to a grave and sudden provocation to deprive the accused of self control to launch the assault on the deceased, almost 20 hours later, with a deadly weapon. However, the evidence of SP6, an inmate, who also resided in the same hostel as the accused and the deceased, seems to suggest that they (accused and deceased) were friends and that he had never seen the deceased disturb or bully the accused. He testified in examination-in-chief:

> Sivalingam dan OKT juga tinggal di Asrama Bakawali 3 bersama. Perhubungan Sivalingam dan OKT seperti biasa iaitu mereka adalah kawan.
>
> Saya tidak pernah melihat Sivalingam mengganggu OKT. Sivalingam adalah pelatih lebih senior kepada OKT.
>
> Di Pusat Serenti Dengkil ada pelatih senior yang membuli pelatih junior. Saya tak pernah melihat Sivalingam membuli OKT.

[33] The evidence of SP6 was never challenged by the defence, leading to the irresistible conclusion the testimony by the accused, that he had been teased, disturbed and pressured by the deceased over the two months he knew him as a fellow inmate, is a fabrication and an after-thought, introduced by the accused to create a defence. In the circumstances, any attempt by the accused to establish the scenario of an accumulated provocation over the two months, with a resultant loss of self control by the accused on the date of the incident, must also be rejected as an afterthought by the accused. In any event, even if the matters alluded to by the accused in his testimony:

> Betul sehari sebelum kejadian Sivalingam ada mengacau saya. Ada sebab-sebab lain yang menyebabkan saya marah terhadap Sivalingam. Sebab-sebab lain adalah:
>
> (1) Habuk rokok dimasukkan dalam makanan saya.
>
> (2) Semasa saya tidur, beliau sembur air pada muka saya.
>
> (3) Tendang, pijak dan tumbuk di bahagian muka saya.
>
> (4) Memarahi saya dengan menggunakan perkataan lucah.

did occur, the said events were not sufficiently grave, by the standards of any reasonable man, to warrant the retaliation and infliction of such a fatal injury to the deceased by way of retribution.

[34] In *Public Prosecutor v Lim Eng Kiat* [1995] 1 MLJ 635, it was held:

> Thus the deprivation of self control must continue, in order to benefit a defendant who kills under circumstances of provocation…. The fatal act should be clearly linked to the passion

which arises from the provocation. If the act was done after the passion has had time to cool, it is murder, even if the act were linked to the earlier provocation…. This means that if the attack was planned in advance, provocation would not serve as a defence, however grave the original provocation. Circumstances which induce a desire for revenge are not consistent with provocation, if the conscious formulation of a desire for revenge means that the defendant has had time to reflect.

The mental background created by previous act of the victim may also be taken into account in ascertaining whether a subsequent act could be said to have caused grave and sudden provocation…. This means that provocation can be cumulative in the sense that previous acts may bring a defendant to a point at which he loses control because the last act, though insufficient in itself, is the final straw which breaks the back of a camel which is already carrying a heavy load from previous provocations, though the final act of provocation must be of a nature which can reasonably be said to revive the earlier ones.

[35] In the final analysis, on the facts before the court, the accused has neither proved the defence of insanity under s 84 Penal Code nor proved that his conduct fell within exception 1 to s 300 of the Penal Code. Upon a careful consideration of the evidence of the accused, I am entirely satisfied that the defence has not cast any doubts on the prosecution's case. I am satisfied that the prosecution has proved, beyond a reasonable doubt, that the accused intended to cause injury to the deceased and, that the act of hitting the deceased on the head with the cangkul was intentional. The prosecution has proved, beyond a reasonable doubt, that the accused has committed the offence of murder, falling squarely within s 300(c) Penal Code and punishable under s 302 Penal Code.

[36] In the above circumstances, the accused is found guilty as charged and convicted. The accused is sentenced to death, that is, to be hung by the neck until death.

[37] Guilty and convicted. Sentenced to death.

Accused convicted and sentenced to death.

Reported by Loo Lai Mee